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THE SEAWORTHINESS TRILOGY: CARRIAGE OF GOODS, INSURANCE, AND PERSONAL INJURY

Nicolas R. Foster*

Marine insurance policies contain express¹ and implied² warranties. The "warranty of seaworthiness" is an implied warranty that serves to protect the insurer against preventable losses. Seaworthiness is the "condition in which a ship should be to enable her to counter whatever perils of the sea a ship of her kind . . . may fairly be expected to encounter in performing the voyage concerned."³ The warranty of seaworthiness has been called "unquestionably the most important warranty of all."⁴

This article discusses the three most important aspects of seaworthiness: (1) its role in shipping, as applied to hull and cargo policies; (2) its relevance to personal injury suits; and (3) its general implications for marine insurance in both these areas. Part I of this article introduces the concept of seaworthiness, its history, and discusses why the United States should adopt a uniform principle of seaworthiness. Part II analyzes seaworthiness in more detail, providing definitions and applications for various situations where the doctrine ap-

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1. An express warranty is "[a]n agreement expressed in a policy, whereby the assured stipulates that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done." BLACK'S LAW DICTIONARY 1588 (6th ed. 1990).

2. An implied warranty "[e]xists when the law derives it by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties." *Id.*

3. E.R. HARDY IVAMY, MARINE INSURANCE 317 (1974); see *Maine Craft Constrs., Ltd. v. Erland Blomqvist, Ltd.*, 1 Lloyd's List L. Rep. 514 (Q.B. 1953).

4. ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 257 (1987).

plies. Parts III and IV address marine hull insurance policies and claims for personal injuries, respectively. Finally, Part V proposes that the United States adopt a uniform policy regarding seaworthiness because of the inconsistency and confusion the current law creates.

I. INTRODUCTION

A. *Recognition of the Warranty of Seaworthiness in the United States and the United Kingdom*

Rather than simply analyze the evolution of seaworthiness in U.S. courts alone, this article also evaluates the development and current status of various aspects of the warranty under British law. Supreme Court Justice Stanley F. Reed once said, "[a]s a matter of American judicial policy, we tend to keep our marine insurance laws in harmony with those of England."⁵ Although American marine insurance practice is largely modeled after the British system, important and instructive differences exist. By evaluating the divergences and similarities between the evolution of the two systems of law, a case will hopefully be made for uniformity and consistency in this area.

The warranty of seaworthiness is "a creation of twentieth century judicial policy concerning risk distribution in the shipping industry and essentially depends on neither common law tort nor contract concepts."⁶ The doctrine was first recognized in the United States in 1902, with the case of *The Osceola*.⁷ There, the U.S. Supreme Court announced a shipowner's liability for a personal injury of a seaman caused by the unseaworthiness of the vessel.⁸ The Supreme Court held that "the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances

5. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 325 (1955) (Reed, J., dissenting).

6. *Delome v. Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971); *see also Gillespie v. United States Steel Corp.*, 321 F.2d 518 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964).

7. *The Osceola*, 189 U.S. 148, 158 (1902).

8. *See id.*

appurtenant to the ship.”⁹

The Court defined the parameters of the seaworthiness doctrine in subsequent cases. In *Mitchell v. Trawler Racer, Inc.*,¹⁰ the Court held that a shipowner’s duty was discharged if the vessel and its equipment were “reasonably fit” for their intended use, but also held that negligence is not a prerequisite to unseaworthiness.¹¹ Further, the non-delegable nature of the duty was enunciated in *Mahnich v. Southern S.S. Co.*¹² *The Osceola* and its progeny define seaworthiness as encompassing two elements: (1) the initial state in which a vessel must be in to be considered seaworthy under the law, and (2) a duty, under marine insurance policies or employer-employee relations, to keep the vessel in that seaworthy state.

Three years after *The Osceola*, the United Kingdom enacted its Marine Insurance Act (“MIA”),¹³ a national codification of marine insurance principles. The United States has yet to implement similar legislation. The MIA was primarily the work of Sir MacKenzie Chalmers, who is said to have “single-handedly” drafted the Act.¹⁴ Rather than being an avenue to create new law, the MIA was “an attempt to accurately reflect the marine insurance law in the courts of the United Kingdom, and elsewhere within the international maritime community.”¹⁵ Despite early enthusiasm for an American Marine Insurance Act, recent discussion focuses on a Restatement of the Law of Marine Insurance. A Restatement would provide guidance for attorneys and the courts, thereby encouraging uniformity.¹⁶ Proponents of this meas-

9. *Id.* at 175.

10. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960) (superseded by statute as stated in *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983)).

11. *See id.* at 549–50.

12. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (superseded by statute as stated in *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532 (3d Cir. 1994)).

13. An Act to Codify the Law Relating to Marine Insurance, 1906, 6 Edw. 7, ch. 41 (Eng.) [hereinafter *Marine Insurance Act 1906*].

14. *See* Patrick J.S. Griggs, *Marine Insurance: Coverage, Warranties, Concealment, Disclosure, Exclusions, Misrepresentations, and Bad Faith*, 66 TUL. L. REV. 423, 426 (1991).

15. Edward V. Cattell, Jr., *An American Marine Insurance Act: An Idea Whose Time Has Come*, 20 TUL. MAR. L.J. 1, 1 (1997).

16. *See* Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41 (1998).

ure generally claim that it would be more practical and easily enacted than actual legislation.¹⁷ However, the push for a uniform American Marine Insurance Act persists. The proponents of such an act stress the importance of a settled marine insurance law,¹⁸ the abolition of the controversial Supreme Court decision of *Wilburn Boat v. Fireman's Fund*,¹⁹ and harmonization of American law with international standards.

B. Wilburn Boat

The issue of seaworthiness of a vessel is "solidly entrenched" in American federal maritime law, which is of great importance to its development in American jurisprudence.²⁰ The meaning and importance of entrenched maritime law was first enunciated in the case of *Wilburn Boat v. Fireman's Fund*.²¹ *Wilburn Boat* involved a houseboat on Lake Texoma whose insurance policy contained express warranties against change of ownership and against commercial use.²² After fire destroyed the houseboat, the insurers discovered that the insured had breached both of the express warranties. In response to a claim made under the policy, the insurers argued that the breaches voided the policy in its entirety, thereby relieving them of liability. A choice of law issue emerged between the English tradition (often followed by American courts), which called for exact compliance of warranties and voidance of the policy for noncompliance, and Texas law, where a breach of warranty does not void a policy unless the breach caused the loss.²³ Following English precedent, the district court and the Fifth Circuit Court of Appeals found that the breaches of warranty automatically voided the ma-

17. See *id.* at 55.

18. See Cattell, *supra* note 15, at 4.

19. *Wilburn Boat Co. v. Fireman's Fund*, 348 U.S. 310 (1955). *Wilburn Boat* is the defining case in American insurance law. With *Wilburn Boat*, the Court essentially made state law the dominating force in marine insurance. See *id.*

20. See *Jefferson Marine Towing, Inc. v. Underwriters at Lloyd's London*, 472 So. 2d 146 (La. Ct. App. 1985); *Aguirre v. Citizens Casualty Co.*, 441 F.2d 141 (5th Cir. 1971). But see Russel Pritchett, *The Implied Warranty of Seaworthiness in Time Policies: the American View*, 1984 LLOYD'S MAR. & COM. L.Q. 195 (1984).

21. *Wilburn Boat*, 348 U.S. at 310.

22. See *id.* at 311.

23. See *id.* at 312.

rine insurance policy.²⁴ These courts rejected the insured's claim that Texas law applied and that the insurers were liable under the policy.²⁵ However, the Supreme Court reversed, holding that state law applied to the interpretation of the marine insurance contract.²⁶

The Court, per Justice Black, found that state law applied in marine insurance cases where there was no judicially established federal admiralty rule.²⁷ With no established American federal admiralty rule dictating the effect of breaches of these warranties, Texas law applied and the insured prevailed.²⁸ *Wilburn Boat* was the genesis of the principle that state marine insurance law could apply where federal common law previously dominated. Thereafter, lower courts followed the "rule" that state law governed questions of law in marine insurance in the absence of a "well entrenched" applicable federal admiralty precedent.²⁹

The fact that seaworthiness, like *uberrima fidei*³⁰ and prejudgment interest, has been deemed a solidly entrenched maritime law is significant for several reasons. Most importantly, federal courts may define the parameters of well entrenched doctrines, and attempt to create uniformity within them. This prevents state law from setting forth differing definitions of seaworthiness. The policy behind the *Wilburn Boat* decision was to keep intact those areas of admiralty law

24. See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 201 F.2d 833 (5th Cir. 1953), *rev'd*, 348 U.S. 310 (1955).

25. See *id.*

26. See *Wilburn Boat*, 348 U.S. at 321.

27. See *id.* at 316.

28. See *id.*

29. See *Bohemia, Inc. v. Homes Insurance Co.*, 725 F.2d 506, 510 (9th Cir. 1984). In *Bohemia*, the Ninth Circuit added its own "prong": a significant need for uniformity may also suffice to justify application of general maritime law, suggesting that uniformity may not always be desirable. See *id.*

30. *Uberrima fides* is defined as:

The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith toward the insurer. . . . Contracts of life insurance are said to be "*uberrima fidei*" when any material misrepresentation or concealment is fatal to them.

BLACK'S LAW DICTIONARY 1520 (6th ed. 1990). See also Thomas R. Beer, Comment, *Established Federal Admiralty Rules in Marine Insurance Contracts and the Wilburn Boat Case*, 1 U.S.F. MAR. L.J. 149, 156 (1989).

already developed in the courts, while leaving other areas to development in state law. However, both state law and dissenting federal law have created fissures within the seaworthiness doctrine.³¹

II. DEFINING SEAWORTHINESS

A. *Attributes and Evaluations of Seaworthiness Generally*

Seaworthiness, as defined by both United States and British law, is "that condition in which a ship should be to enable her to counter whatever perils of the sea a ship of her kind, and laden as she is, may fairly be expected to encounter in performing the voyage concerned."³² The MIA states, with equal ambiguity, that "a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured."³³ Under the Carriage of Goods by Sea Act ("COGSA"),³⁴ "[n]either the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. . . ."³⁵ The lack of specific statutory definitions forces courts to define seaworthiness on a case-by-case basis. Attempting to give substance to the definition of seaworthiness, courts established: (1) the non-delegable and absoluteness of the duty; (2) the requirements of seaworthiness in relation to the vessel; (3) the need for evaluating seaworthiness based on the time and place of use of the vessel; and (4) examples of

31. For example, despite the fact that seaworthiness has been held to be an entrenched federal precedent, California codified it. See CAL. INS. CODE § 1920 (Deering 1997) ("In every marine insurance upon a ship or involving transportation by ship, a warranty is implied that the ship is seaworthy."). The code provides a definition of seaworthy: "[a] ship is seaworthy when reasonably fit to perform the services and encounter the ordinary perils of the voyage contemplated by the parties to the policy." *Id.* § 1921. Other aspects of seaworthiness are likewise codified. See *id.* § 1922 (compliance with warranty of seaworthiness); *id.* § 1923 (extent of warranty of seaworthiness); and *id.* § 1924 (seaworthiness as to portions of voyage). See also CAL. HARB. & NAV. CODE § 863 (Deering 1997) (unseaworthy vessel); CAL. INS. CODE § 440 (kinds of warranties).

32. IVAMY, *supra* note 3, at 317; *Maine Craft Constructions, Ltd. v. Erland Blomqvist, Ltd.*, 1 Lloyd's Rep 514 (Q.B. 1953).

33. Marine Insurance Act 1906, *supra* note 13, § 39(4).

34. 46 U.S.C.A. app. § 1304 (West 1975).

35. *Id.*

unseaworthiness in specific circumstances.

"The duty to provide a seaworthy vessel is absolute and non-delegable."³⁶ It is no defense to the shipowner that a third party, rather than the shipowner, brought about the condition of unseaworthiness.³⁷ If a shipowner breaches this non-delegable duty to provide a seaworthy ship to transport goods, the shipowner will not recover under the insurance policy for a lost vessel or cargo. Where the unseaworthiness causes a personal injury, the shipowner may be liable for such injury.

The evaluation of seaworthiness in relation to the vessel itself is threefold: sound ship, proper gear, and competent crew.³⁸ Each of these "contributes in a special way to provide a vessel reasonably suitable for her intended service."³⁹ The warranty of seaworthiness guarantees that the ship itself is staunch and sound, of sufficient equipment, construction, and supplies; that she has a captain of competent skill and capac-

36. *Sears, Roebuck & Co., v. American President Lines, Ltd.*, 345 F. Supp 395, 398 (N.D. Cal. 1971).

37. See *Alaska S.S. Co. v. Patterson*, 347 U.S. 396 (1954); *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367 (9th Cir. 1964); *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 310 F.2d 481 (9th Cir. 1962), *rev'd*, 376 U.S. 315 (1964) (superseded by statute as stated in *United States Fidelity & Guaranty Co. v. Plovodba*, 683 F.2d 1022 (7th Cir. 1982)).

38. In the mid-nineteenth century, the Supreme Court, arguably in an effort to guide lower courts, set forth certain conditions it deemed relevant to seaworthiness:

A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his act and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper.

The Propeller Niagara v. Cordes, 62 U.S. 7, 22 (1858).

39. *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247 (2d Cir. 1966), *rev'd*, 386 U.S. 724 (1967) (quoting *Mitchell v. Trawler Racer, Inc.* 362 U.S. 539, 550 (1960)).

ity and a competent and sufficient crew; and generally that she is, in every respect, fit for the voyage insured.⁴⁰ Seaworthiness is therefore a highly fact-sensitive and situation-specific inquiry, thereby making it a jury issue.⁴¹

Seaworthiness is "a relative state and not necessarily an absolute one,"⁴² often determined by how the vessel is used and the place of its use. The question of seaworthiness is therefore best viewed in light of the "usages of the port where the vessel is fitted out, in reference to the destined voyage,"⁴³ the nature of the voyage itself,⁴⁴ and the time of year of the voyage.⁴⁵ Unseaworthiness may occur when the unsafe condition is only temporary or transitory.⁴⁶ Thus, a hazard may be of short duration or recent vintage, yet nevertheless consti-

40. See *Taylor v. Lowell*, 3 Mass. 331 (1807); see also *Heinrich C. Horn v. CIA de Navegacion Fruco S.A.*, 404 F.2d 422 (5th Cir. 1968); *Sanford & Brooks Co. v. Columbia Dredging Co.*, 177 F. 878 (4th Cir. 1910) (defining seaworthiness as "that condition of a vessel which enables it to avoid exposure of the cargo to the perils of the sea. It must be sufficiently tight, staunch, and strong to resist the ordinary attacks of winds and seas."); *Texaco Inc. v. Universal Marine, Inc.*, 400 F. Supp. 311 (E.D. La. 1975); *Georgia-Pacific Corp. v. The Motorship Marilyn L.*, 331 F. Supp. 776 (E.D. Va. 1971); *Mathis v. Hanover Ins. Co.*, 192 S.E.2d 510 (Ga. Ct. App. 1972) (stating that the vessel must have adequate stores and sound machinery, and have properly supplied fuel); *Bouillon v. Lup-ton*, 143 Eng. Rep. 726, 730 (1863).

41. The following jury instruction has been used at trial: "If an unsafe condition existed on the vessel and if, in your opinion, such unsafe condition constituted unseaworthiness, no matter for how short a time, and if that unseaworthiness was created or did come into. . . ." *Silver v. American Export Isbrandtsen Lines*, 310 F. Supp. 681, 686 (E.D. Va. 1970); *Venable v. A/S Det Forenede Dampskibsselskab*, 275 F. Supp. 591 (E.D. Va. 1967). California's Insurance Code provides the following jury instruction:

You are instructed that the warranty of seaworthiness imports that the ship is staunch and sound, of sufficient materials and construction, with sufficient equipment, stores, and supplies and that she has a captain of competent skill and capacity and a competent and sufficient crew, and is generally in every respect fit for the voyage insured.

CAL. INS. CODE § 1920 (Deering 1997).

42. PARKS, *supra* note 4, at 258; see also *Lemar Towing Co. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652 (E.D. La. 1972), *aff'd*, 471 F.2d 609 (5th Cir. 1973); *Smith v. Northwestern Fire & Marine Ins. Co.*, 159 N.E. 87 (N.Y. 1927).

43. *Hazard's Adm'r v. New Eng. Marine Ins. Co.*, 33 U.S. 557 (1834).

44. See *Wilmering v. Lexington Ins. Co.*, 678 S.W.2d 865 (Mo. Ct. App. 1984).

45. See *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Ct. App. 1985).

46. See *Mitchell v. Trawler Racer, Inc.* 362 U.S. 539 (1960) (superseded by statute as stated in *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983)); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *Dos Santos v. Ajax Navigation Corp.*, 532 So. 2d 231 (Fl. App. 1988).

tute unseaworthiness.⁴⁷ The absence of crucial equipment, such as adequate safety equipment, may also constitute unseaworthiness.⁴⁸

There are many breach of warranty of seaworthiness cases that consider what constitutes a "seaworthy condition."⁴⁹ For example, courts have found vessels unseaworthy based on the following types of "defects": slippery decks,⁵⁰ a heavy load;⁵¹ a defective hull; defective or damaged equipment or appliances (e.g., engines, generators, pumps, pipes);⁵² fail-

47. See *Shenker v. United States*, 322 F.2d 622 (2d Cir. 1963); *Puddu v. Royal Neth. S.S. Co.*, 303 F.2d 752 (2d Cir. 1962).

48. See *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969); *Moore v. O/S Fram*, 226 F. Supp. 816 (S.D. Tex. 1963).

49. See, e.g., *The Malcolm Baxter, Jr.*, 277 U.S. 323 (1928) (leaks constitute unseaworthiness); *Calo v. Ocean Ships*, 57 F.3d 159 (2d Cir. 1995) (excessively warm temperature in the engine room could constitute unseaworthiness); *Mitchell v. F/V Janice*, 1994 U.S. App. LEXIS 565 (9th Cir. Jan. 4, 1994) (an open hatch, without more, does not constitute unseaworthiness); *Cheek v. Williams-McWilliams Co.*, 697 F.2d 649 (5th Cir. 1983) (mere existence of film resulting from misting through pump operation under windy conditions did not necessarily constitute unseaworthiness); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) (condition of ship beams constituted unseaworthiness); *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660 (2d Cir. 1975) (slippery deck constitutes unseaworthiness); *Shephard v. S.S. Nopal Progress*, 497 F.2d 963 (5th Cir. 1974) (overcrowded and foggy refrigerated hold as unseaworthy); *Carret v. Enso Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1973) (defective cargo bands constitute unseaworthy condition); *Parker v. S.S. Dorothe Olen-dorff*, 483 F.2d 375 (5th Cir. 1973) (defective wiring would constitute unseaworthiness); *Swords v. American Sealanes Inc.*, 443 F.2d 1324 (4th Cir. 1971) (defective cargo hook); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969) (lack of adequate safety equipment aboard a vessel may constitute unseaworthiness); *U.S. v. M/V Marilena P*, 433 F.2d 164 (4th Cir. 1969) (machinery damage); *Dugas v. Nippon Yusen Kaisha*, 378 F.2d 271 (5th Cir. 1967); *American Ins. Co. v. Keane*, 233 F.2d 354 (D.C. Cir. 1956) (defective compass may constitute unseaworthiness); *Manhat v. U.S.*, 220 F.2d 143 (2d Cir. 1955) (absence of hatch covers in the 'tween deck of the ship); *Mitsubishi Shoji Kaisha, Ltd. v. Societe Purfina Maritime*, 133 F.2d 552 (9th Cir. 1942) (vessel's engine valves in need of grinding); *In re Complaint of Tecomar S.A.*, 765 F. Supp. 1150 (S.D.N.Y. 1991) (crack in ship's hull and defect in steering gear and defects in ship's seawater cooling system); *Cantiere Meccanico Brindisino v. Janson*, 3 K.B. 452 (C.A. 1912); *Clapham v. Langton*, 122 Eng. Rep. 1001 (K.B. 1864); *Burges v. Wickham* 122 Eng. Rep. 251 (Q.B. 1863).

50. See *Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2d Cir. 1973) (holding that unseaworthiness exists only when the oil or grease creates such a condition of slipperiness that the deck or stairway is no longer reasonably fit for its intended use by the crew).

51. See *Carvalho v. Andrea C.*, 880 F.2d 416 (9th Cir. 1990).

52. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (holding that no warranty attaches to an appurtenance that could not be used as part of the vessel's operation); *Hellenic Lines Ltd. v. Life Ins. Corp. of India*, 526 F.2d 830 (2d

ure of navigational equipment (but not failure to maintain radar);⁵³ obstructions on deck;⁵⁴ defective hatches;⁵⁵ and the possibility of arrest.⁵⁶

B. Unseaworthiness Versus Negligence

The difference between negligence and unseaworthiness is an important conceptual distinction. This distinction becomes even more significant when discussing injuries to seamen.⁵⁷ "Unseaworthiness is a condition. The manner in which that condition arises, whether by negligence or otherwise, is irrelevant to the owner's liability for personal injury or damage"⁵⁸ The two elements are conceptually independent.⁵⁹ Negligence is the basis of tort actions, whereas the seaworthiness warranty is generally associated with contract liability.⁶⁰ The seaworthiness issue is therefore treated like a

Cir. 1975) (failure to produce shaft alignment readings); *Atlantic Banana Co. v. M/V Calanca*, 342 F. Supp. 447 (S.D.N.Y. 1972) (one of three electrical generators shut down); *Karobi Lumber Co. v. S.S. Norco*, 249 F. Supp. 324 (S.D. Ala. 1966) (operation with only two boilers).

53. See *Havens v. F/T Polar Mist*, 996 F.2d 215 (9th Cir. 1993); *American Smelting v. Irish Spruce*, 548 F.2d 56 (2d Cir. 1977); *Aakre*, 122 F.2d 469 (2d Cir. 1941) (use of old charts did not constitute unseaworthiness); *California & Hawaiian Sugar Corp. v. Columbia S.S. Co.*, 391 F. Supp. 894 (E.D. La. 1972) (sailing directions not readily available); *The Temple Bar*, 45 F. Supp. 608 (D. Md. 1942) (failure to maintain charts not necessarily unseaworthiness); *The Heddernheim*, 39 F. Supp. 558 (S.D.N.Y. 1941) (use of chart on a scale of 1/200,000 instead of 1/100,000 did not constitute unseaworthiness). With respect to radar, Professor William Tetley notes that, "it would appear that a ship still does not need Loran or radar in order to be considered seaworthy, although in many jurisdictions, particularly canals and inland waterways, such equipment is compulsory." WILLIAM TETLEY, *MARINE CARGO CLAIMS* 384 (3d ed. 1988).

54. See *Billedeaux v. Tidex, Inc.*, Civ. A. No. 91-134, 1993 WL 21420, at *1 (E.D. La. 1993), *aff'd*, 3 F.3d 437 (5th Cir. 1993) (unpublished table decision).

55. See *New York Merchandise Co., Inc. v. Liberty Shipping Corp.*, 509 F.2d 1249 (9th Cir. 1975) (defective vent closing devices); *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580 (2d Cir. 1971) (failure to cover hatches with tarpaulins not unseaworthiness); *Sears, Roebuck & Co. v. American President Lines*, 345 F. Supp. 395 (N.D. Cal. 1971) (hole in coamings of the hatches).

56. See *Morrissey v. S.S.A. & J. Faith*, 252 F. Supp. 54 (N.D. Ohio 1965).

57. See *infra* Part IV.A.

58. Beer, *supra* note 30, at 159; see also *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971).

59. See *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F.2d 347 (4th Cir. 1968); *Armstrong v. Chambers & Kennedy*, 340 F. Supp. 1220 (S.D. Tex. 1972) (holding a shipowner liable for unseaworthiness as a concept wholly apart from negligence or due care concepts).

60. See *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co.*,

breach of warranty rather than the narrower duty-breach inquiry for negligence.⁶¹ In fact, if there is a condition constituting unseaworthiness, the carrier's care, or lack of it, does not insulate him from liability.⁶²

C. *Seaworthiness as it Pertains to the Vessel's Crew*

The concept of seaworthiness encompasses not only the vessel and its gear, but also its crew.⁶³ A vessel may be unseaworthy by virtue of an incompetent crew or individual crewmembers. The following areas have been the subject of unseaworthiness litigation with respect to the crew: operational negligence,⁶⁴ insufficient crew,⁶⁵ and injuries inflicted by "lascivious crewmembers."⁶⁶ The litigation in this area involves two distinct problems: (1) dangerous crewmen who inflict personal injury, and (2) incompetent crewmen who, through their negligence, cause damage to the vessel or cargo. With respect to the latter, a seaman is not "reasonably fit for the intended service of the ship," if he is not "equal in seaman'ship and disposition to men ordinarily employed as merchant seamen."⁶⁷ This rule extends to shore-based employees engaged in work "traditionally performed by seamen."⁶⁸

310 F.2d 481 (9th Cir. 1962), *rev'd*, 376 U.S. 315 (1964) (superseded by statute as stated in *United States Fidelity & Guaranty Co. v. Plovindba*, 683 F.2d 1022 (7th Cir. 1982)).

61. See *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991).

62. See *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir. 1967).

63. See *Lewis v. Pacific-Gulf Marine, Inc.*, 91 F.3d 121 (1st Cir. 1996) (unpublished table decision) (lack of adequate personnel or proper equipment could constitute unseaworthiness); *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952) (warranty of seaworthiness breached if master or crew are not competent for their duties); *Lemar Towing Co. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652 (E.D. La. 1972), *aff'd*, 471 F.2d 609 (5th Cir. 1973).

64. See *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).

65. See *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 (5th Cir. 1983) ("[A]n . . . improperly manned vessel is considered unseaworthy as a matter of law . . .").

66. "A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member." *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 340 (1955).

67. *Foss v. Oliver J. Olson & Co.*, 58 Cal. Rptr. 511, 514 (Ct. App. 1967); see also *Jones Act*, 46 U.S.C.A. app. § 688 (West 1975 & Supp. 1999); *Pashby v. Universal Dredging Corp.*, 608 F.2d 1312 (9th Cir. 1979) ("A vessel may be unseaworthy because of 'defective' crew members. A seaman must be reasonable fit; he must be equal in disposition to ordinary men of that profession").

68. *Murphy v. National Bulk Carriers, Inc.*, 310 F. Supp. 1246, 1249 (E.D. Pa. 1970) ("[T]he warranty of seaworthiness [is not] limited to members of the ship's crew, but is extended to shorebased employees who come within ambit of

The warranty of seaworthiness does not require that the seaman be competent to meet all contingencies, but merely that he be "equal in disposition and seamanship to ordinary men in the same calling."⁶⁹ In *Lemar Towing Co., Inc. v. Fireman's Fund Insurance Company*,⁷⁰ for example, the court held that the crew of a tug, and particularly its captain, was incompetent at the commencement of the voyage, thus rendering the tug unseaworthy at all subsequent times.⁷¹ Such unseaworthiness resulted from the owner's failure to determine the qualification and competence of the crew before the commencement of the voyage.⁷²

In addition to the inadequacy of the crew's credentials, "an unseaworthy condition may result from the [seamen's] improper use of otherwise seaworthy equipment."⁷³ An unsafe method of work may therefore constitute unseaworthiness, even though the crew is otherwise competent and the equipment seaworthy.⁷⁴ Thus, unseaworthiness can result from an adequate and competent crew performing work in an unsafe manner, or an inadequate crew performing tasks in a safe and prudent manner.⁷⁵

With respect to seamen's brawls, an owner may be liable

its humanitarian policy because, when aboard, they engaged in work traditionally performed by seamen.").

69. *The Roberta*, 58 Lloyd's List L. Rep. 159 (1937); see also *Horn v. Cia de Navegacion Fruco*, 404 F.2d 422 (5th Cir. 1968); *International Packers London, Ltd. v. Ocean S.S. Co. Ltd.*, 2 Lloyd's Rep. 218 (Q.B. 1955).

70. *Lemar Towing Co. v. Fireman's Fund Ins. Co.* 352 F. Supp. 652 (E.D. La. 1972), *aff'd*, 471 F.2d 609 (5th Cir. 1973).

71. See *id.* at 665.

72. See *id.* at 652.

73. *Rogers v. Eagle Offshore Drilling Servs., Inc.*, 764 F.2d 300, 303 (5th Cir. 1985).

74. See *Atlantic & Gulf Stevedores v. Ellerman Lines Ltd.*, 382 U.S. 812 (1965); *Rogers v. Eagle Offshore Drilling Servs., Inc.*, 764 F.2d 300 (5th Cir. 1985); *Adams v. Uglan Management Co.*, 515 F.2d 89 (9th Cir. 1975) (involving improper method of berthing ship as constituting unseaworthiness); *Kyzar v. Vale Do Ri Doce Navegacai, S.A.*, 464 F.2d 285 (5th Cir. 1972) (involving failure to provide hard hat and tag lines); *Smith v. Olsen & Ugelstad*, 459 F.2d 915 (6th Cir. 1972) (holding that an unsafe procedure prescribed for unloading cargo may result in a condition of unseaworthiness); *Duncan v. Transeastern Shipping Corp.*, 413 F.2d 1023 (5th Cir. 1969) (holding that repeated mishandling of buckets in a negligent manner constituted an unseaworthy condition); *American Mail Line v. United States*, 377 F. Supp. 657 (W.D. Wash. 1974) (holding that carrier's lack of standardized procedures for ballasting deep tanks constituted unseaworthiness).

75. See *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967); *Orient Mid-East Lines, Inc. v. A Shipment of Rice*, 496 F.2d 1032 (5th Cir. 1974).

even though he did not have actual knowledge of the "incompetency or vicious proclivities" of crew members.⁷⁶ An attack, brawl, fight, or other disorderly conduct constitutes actionable unseaworthiness if the act is of such an aggravated character that it constitutes circumstantial evidence that during the time leading up to the assault the ship was in an unseaworthy condition because of the presence of such an individual.⁷⁷ However, the warranty "does not mean that the shipowner is liable for injuries resulting from every sailors brawl."⁷⁸ Whether a shipowner is held liable is a question of degree and common sense. As Judge Learned Hand stated in *Jones v. Lykes Brothers Steamship Co.*:⁷⁹

All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours. Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of "disposition" of "the ordinary men in the calling."⁸⁰

Thus, courts must take into consideration the nature of the seamen's profession when determining whether disorderly conduct amounts to unseaworthiness.

III. MARINE HULL POLICIES

Seaworthiness is probably most significant in terms of hull insurance.⁸¹ There is a warranty of seaworthiness in every policy of marine hull insurance unless expressly waived.⁸² In fact, the basis for the seaworthiness doctrine is

76. See *Kenn v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952); see also E.L. Kellett, Annotation, *Liability under Jones Act or Seaworthiness Doctrine for Injuries Caused by Assault*, 22 A.L.R.3d 624 § 9 (1968).

77. See *Harbin v. Interlake S.S. Co.*, 570 F.2d 99, 103 (6th Cir. 1978).

78. *Foss v. Oliver J. Olsen & Co.*, 58 Cal. Rptr. 511, 515 (Ct. App. 1967) (citing *Boudoin v. Lykes Brothers S.S. Co.*, 348 U.S. 336, 338-39 (1954)).

79. *Jones v. Lykes Brothers S.S. Co.*, 204 F.2d 815 (2d Cir. 1953).

80. *Id.* at 817.

81. The concept of seaworthiness with regard to insurance policies provokes some confusion, but authorities agree that the term is defined according to the situation of the ship. See Graydon S. Staring & George L. Waddell, *Marine Insurance*, 5 TUL. L. REV. 1619, 1638-39 (1999).

82. *L & L Marine Serv., Inc. v. Insurance Co. of N. Am.*, 479 U.S. 1065 (1987); *Insurance Co. of N. Am. v. Board of Comm'rs*, 733 F.2d 1161 (5th Cir.

marine hull insurance.⁸³ As the court in *Mathis v. Hanover Insurance Co.* explained, "the warranty and all its ramifications was developed for the peculiar circumstances of single-voyage insurance for cargo ships and the warranty was of utmost importance since it was not economically feasible for the insurers to inspect the vessels involved in each transaction."⁸⁴ The warranty therefore became a "useful tool in determining liability for otherwise unexplainable losses on the high seas."⁸⁵

A. *Duty to Disclose when Obtaining Hull Policy*

Seaworthiness, for purposes of hull insurance, becomes an issue when a vessel is lost or damaged and the insurer attempts to avoid liability on an insurance policy on the grounds that the shipowner breached the implied warranty of seaworthiness. The warranty implied in an insurance policy is a continuing obligation that the owner will not, from bad faith or neglect, knowingly permit a vessel to break ground in an unseaworthy condition.⁸⁶ The duty of utmost good faith, or *uberrima fidei*, requires that the insured disclose to the insurer any information material to the risk involved (e.g., transport of dangerous cargo, etc.).⁸⁷ *Uberrima fidei*, an en-

1984); *Neubros Corp. v. Northwestern Nat'l Ins. Co.*, 359 F. Supp. 310 (E.D.N.Y. 1972); see also discussion *infra* Part III.C.

83. Furthermore, the warranty is commercial in nature, and does not apply to pleasure craft. See generally *Mathis v. Hanover Ins. Co.* 192 S.E.2d 510, 512 (Ga. Ct. App. 1972) ("We do not believe the warranty of seaworthiness under traditional maritime law can be read into an 'All Risks Yacht Policy' in which use of the vessel is restricted to private pleasure."); *Johnson Bros. Boat Works v. Conrad*, 156 A.2d 175 (N.J. Super. Ct. Law Div. 1959) (holding that a continuing warranty of seaworthiness as applied to a small pleasure craft insured under a liability policy, if it exists, would be contractual in character and should satisfy the essential requisites of a contract, and where the minds of the parties do not meet, there is no contractual basis for the continuing warranty).

84. *Mathis*, 192 S.E.2d at 512.

85. *Id.*

86. See *Insurance Co. of N. Am.*, 733 F.2d at 1161.

87. See *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485 (1883). But see *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 57 F.3d 50 (1st Cir. 1995) (holding that insured did not breach warranty of seaworthiness in marine insurance policy under doctrine of *uberrima fidei* by failing to hire marine mechanic to ascertain vessel's seaworthiness before setting sail, even though Coast Guard had recently pumped boat out); *Myers v. Fidelity & Cas. Co.*, 759 F.2d 1542 (11th Cir. 1985) (holding that mortgagee loss payee had no duty to report grounding of vessel and keel damage prior to inception of maritime hull policy and, hence, policy was not voided). See generally *supra* note 30.

trenched federal precedent,⁸⁸ also dictates voiding the marine contract if the facts that the insured fails to disclose are material and the insurer relied on those facts in agreeing to issue the policy.⁸⁹ The Court first incorporated *uberrima fidei* into the general admiralty law in *M'Lanahan v. Universal Insurance Co.*⁹⁰ in 1828. The Court held in a subsequent case that the duty of utmost good faith with respect to marine insurance imposed a strict burden of disclosure on the insured.⁹¹ The insured⁹² is therefore under a duty to disclose any known defect constituting unseaworthiness. If the insured fails to disclose material facts, recovery under the policy is barred.

B. Presumptions

Presumptions play an important role in determining the burden of proof in marine insurance litigation cases involving loss of cargo or damage to the vessel when seaworthiness is an issue.⁹³ A vessel is generally presumed seaworthy.⁹⁴ Therefore, an insurer attempting to defeat the insured's claim by alleging unseaworthiness of the vessel bears the burden of proof.⁹⁵

However, if there is no readily apparent cause (like heavy

88. See *Beer*, *supra* note 30, at 156.

89. See *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866 (2d Cir. 1985); see generally Thomas Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. MAR. L. & COM. 1 (1998).

90. *M'Lanahan v. Universal Ins. Co.*, 26 U.S. 170 (1828).

91. See *Sun Mut. Ins. Co.*, 107 U.S. at 485.

92. A vessel became a third-party beneficiary of the cargo policy by virtue of the insurer's waiver of subrogation rights against the vessel, thus any breach of good faith by the demise charter could not be imputed to it. See, e.g., *Durant & Russel, Inc. v. Dillingham Tug & Barge Corp.*, 895 F.2d 507, 511 (9th Cir. 1989).

93. See generally Geoffrey Brice, *Unexplained Losses in Marine Insurance*, 16 MAR. LAW. 105 (1991).

94. See *Hanover Fire Ins. Co. v. Holcombe*, 223 F.2d 844 (5th Cir. 1955); *J. Aron & Co. v. Dampskibs Selsk Dannebrog*, 290 F. 733 (2d Cir. 1923); *Great American Ins. Co. v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235 (2d Cir. 1973); *Boston Iron & Metal Co. v. Automobile Ins. Co.*, 145 A. 501 (Ind. 1929); *Snethen v. Memphis Ins. Co.*, 3 La. Ann. 474 (1848); *Perry v. Cobb*, 34 A. 278 (Me. 1896); *Fisch v. Insurance Co. of N. Am.*, 130 A.2d 891 (N.J. Super. Ct. App. Div. 1957).

95. See, e.g., *Granger v. Providence-Washington Ins. Co.*, 200 F. 730 (2d Cir. 1912); *Antoine v. Lake Charles Stevedores, Inc.*, 249 F. Supp. 290, 291 (W.D. La 1965); *Massey S.S. Co. v. Importers & Exporters Ins. Co.*, 189 N.W. 415 (Minn. 1922); *R.A. Houghton and Mancon Ltd. v. Sunderland Marine Mut. Ins. Co. Ltd.*, 1 Lloyd's Rep. 60 (Q.B. 1988); *Panamanian Oriental S.S. Corp. v. Wright*, 1 W.L.R. 882 (C.A. 1971).

storms) for the damage to the vessel or cargo, the vessel is presumed unseaworthy.⁹⁶ The sinking or other damage is then presumed caused, not by a "peril of the sea," which the insurance contract ordinarily covers, but by the vessel's own inherent unseaworthiness.⁹⁷ This presumption is called "the calm water presumption."⁹⁸ The insured may, however, rebut the presumption by establishing the vessel's seaworthiness prior to the damage and the absence of conditions that would render the vessel unseaworthy.⁹⁹ If the insured provides no evidence of seaworthiness, however, the claim will probably fail.¹⁰⁰

Once the insured demonstrates seaworthiness, a counter presumption then arises that "some extraordinary, although unknown and unascertainable, perils of the sea" caused the unexplained sinking and/or loss.¹⁰¹ There must, in that case, be some reasonable possibility that some "unseen peril" caused the loss.¹⁰² If the insured meets this burden of reason-

96. See *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F.2d 441, 443 (1st Cir. 1953); see also *Federazione Italiana dei Corsorzi Agrari v. Mandask Compania De Vapores*, 388 F.2d 434, 436 (2d Cir. 1968) ("Under these circumstances [i.e. when the loss of a ship is unexplained], it is presumed that the loss was occasioned by the unseaworthiness of the [ship]."); *Eastern Transp. Co. v. Insley*, 51 F.2d 494 (4th Cir. 1931); *Derby Co. v. A.L. Mechling Barge Lines, Inc.*, 258 F. Supp. 206, 211 (E.D. La. 1966) ("[A] vessel . . . is presumed to be unseaworthy when she sinks under normal conditions and in the absence of proof that she was improperly handled."); *Ohio River Co. v. M/V Irene Chotin*, 238 F. Supp. 114, 118-19 (E.D. La. 1965) ("The law is well settled . . . that when a vessel sinks under normal conditions, and absent sufficient proof that improper handling caused the sinking, the vessel is presumed to have been unseaworthy."); *Glens Falls Ins. Co. v. Long*, 77 S.E.2d 457 (Va. 1953).

97. See *Pace v. Insurance Co. of N. Am.*, 838 F.2d 572, 572 (1st Cir. 1988).

98. *Jefferson Marine Towing, Inc. v. Underwriters at Lloyd's London*, 472 So. 2d 146, 151 (La. Ct. App. 1985) (quoting *Boston Ins. Co.*, 204 F.2d at 443).

99. See *Boston Ins. Co.*, 204 F.2d at 443 (cited with approval in *Pace*, 838 F.2d at 577); see also *Darien Bank v. Travelers Indem. Co.*, 654 F.2d 1015, 1021 (5th Cir. 1981); *Wilmering v. Lexington Ins. Co.*, 678 S.W.2d 865, 870 (Mo. Ct. App. 1984). In *Jefferson Marine Towing*, 472 So. 2d at 146, the owner of the vessel, by proving that the vessel was seaworthy before it sank, successfully rebutted the "calm water" presumption of maritime law that vessel was unseaworthy. See *id.*

100. See *Brice*, *supra* note 93, at 108.

101. *Boston Ins. Co.*, 204 F.2d at 443; see also *Darien Bank*, 654 F.2d at 1021; *Reisman v. New Hampshire Fire Ins. Co.*, 312 F.2d 17, 20 (5th Cir. 1963); *Tropical Marine Prods., Inc. v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116 (5th Cir. 1957).

102. See *Insurance Co. of N. Am. v. Lanasa Shrimp Co.*, 726 F.2d 688, 689 (11th Cir. 1984).

In case of unexplained sinking of a vessel insured under a commercial

able probability, then the insurer has the burden of showing that the vessel was unseaworthy in some respect.¹⁰³ The insurer's burden also requires a showing that the shipowner knew of the unseaworthy condition.¹⁰⁴ For example, maintenance of class is not conclusive evidence of seaworthiness.¹⁰⁵ Furthermore, a ship is not unseaworthy *ipso facto* if its condition violates a statute, but violation of a statute may provide guidance as to whether an unseaworthy condition existed.¹⁰⁶ However, where a ship violates a statutory rule of navigation intended to prevent collisions, the burden rests on the shipowner to show that the vessel could not have caused the loss.¹⁰⁷

C. Waiver

The implied warranty of seaworthiness can be waived, or superseded by the effect of coverage provisions in the policy or

hull marine policy, the insured cannot recover on mere proof of sinking in calm seas, because it is presumed that the vessel was unseaworthy when she left port, although the presumption may be rebutted and if insured proves that the vessel left port in a seaworthy condition a counter presumption arises that the sinking and loss was caused by some extraordinary peril of the sea and insurer then has ultimate burden of proving unseaworthiness.

Id.; see also *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 990 F.2d 865 (6th Cir. 1993); *Mathis v. Hanover Ins. Co.*, 192 S.E.2d 510 (Ga. Ct. App. 1972); *Inland Rivers Serv. Corp. v. Hartford Fire Ins. Co.*, 418 N.E.2d 1381, 1382-83 (Ohio 1981).

103. See *Texaco, Inc. v. Universal Marine, Inc.*, 400 F. Supp. 311, 312-13 (E.D. La. 1975) (holding that insurer "has the burden of proving that the shipowner . . . acted out of bad faith or neglect by knowingly permitting the [vessel] to sail in an unseaworthy condition"); *Jefferson Marine Towing*, 472 So. 2d at 146 (holding that underwriters of maritime policy, who presented no witnesses with knowledge of sinking of insured vessel, failed to meet burden of establishing breach of implied or express warranties of seaworthiness was proximate cause of loss).

104. See *Foster v. Reliance Ins. Co.*, 487 So. 2d 192, 194 (La. Ct. App. 1986) ("An insurer bears the burden of proving that a vessel is unseaworthy, and this burden requires a showing that the shipowner had knowledge of the condition"); *Jefferson Marine Towing*, 472 So. 2d at 150.

105. See *Griggs*, *supra* note 14, at 439.

106. See *Harris v. Glens Falls Ins. Co.*, 493 P.2d 861, 863-64 (Cal. 1972) (holding that absent a statute or regulation requiring a yacht to be equipped with a two-way radio, failure of insured to have an operable radio transmitter aboard his yacht did not render the yacht unseaworthy in breach of the implied warranty of seaworthiness); *Warren v. Manufacturers Ins. Co.*, 30 Mass. 518 (1833).

107. See *Insurance Co. of N. Am. v. New Orleans*, 733 F.2d 1161, 1165 (5th Cir. 1984).

by other circumstances evincing an intent to waive.¹⁰⁸ Also, equitable considerations may justify judicial waiver of the warranty.¹⁰⁹ In determining the effectiveness and validity of a waiver clause, courts evaluate whether the language of the waiver provision unambiguously covers risks ordinarily excluded by a breach of the implied warranty of seaworthiness.¹¹⁰ If the clause does cover such risks, then it presumably underwrites that particular type of unseaworthiness.¹¹¹ Clauses that clearly communicate the particular risks involved will generally be upheld.¹¹²

As with any warranty, the insurer may waive the warranty of seaworthiness. If a defect leads to an unseaworthy condition, and the insurer knows of this defect—through its agent or otherwise—the insurer may be deemed to have waived any available warranty claims.¹¹³ This situation most likely comes into play when the insurer takes an active part in the supervision and inspection of the vessel. The burden, however, is on the insured, as he cannot simply rely on patent defects to justify a waiver.¹¹⁴ The key inquiry in an insurer's purported waiver is the actual or constructive knowledge, not

108. See *IVAMY*, *supra* note 32, at 331-34. See, e.g., *Reliance Ins. Co. v. Escapade*, 280 F.2d 482 (5th Cir. 1960); *Provincial Ins. Co. of Canada v. Leduc* [1874] L.R.-P.C. 244; *Weir v. Aberdeen*, 106 Eng. Rep. 383 (1819); *P. Samuel & Co. v. Dumas*, 13 Lloyd's List L. Rep. 503 (C.A. 1922); *Daneau v. Laurent Gendron* [1964] 1 Lloyd's List L. Rep. 220. See also *Capital Coastal Corp. v. Hartford Fire Ins. Co.*, 378 F. Supp. 163 (E.D. Va. 1974) (underwriters did not waive warranty that certain captain would be employed on the injured tug).

109. See *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422 (5th Cir. 1993).

110. See *id.*

111. See *id.*

112. See *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 497-98 (9th Cir. 1988) (finding that contract clauses clearly and unequivocally communicate that the risk of unseaworthiness would fall on [insured] once it accepted the vessel. "Similar disclaimers have been found to be clear and unequivocal and have been enforced in admiralty."); *McAllister Lighterage Line, Inc. v. Insurance Co. of N. Am.*, 244 F.2d 867 (2d Cir. 1957).

113. See *Dant & Russell, Inc. v. Dillingham Tug & Barge Corp.*, 877 F.2d 1404, 1407 (9th Cir. 1989), *amended, reh'g denied*, 895 F.2d (9th Cir. 1990). Knowledge of a defect amounting to unseaworthiness may not, however, bar a charterer's right to rely on the owner's implied warranty of seaworthiness. See *Neubros Corp. v. Northwestern Nat'l Ins. Co.*, 359 F. Supp. 310, 315 (E.D.N.Y. 1972) (citing *Church Cooperage Co. v. Pinkney*, 170 F. 266 (2d Cir. 1909)).

114. See *Neubros Corp.*, 359 F. Supp. at 317 (holding that Inchmaree clause covering loss caused from latent defects did not vitiate warranty of seaworthiness where insured had an affirmative duty to reveal patent defects to underwriters).

the obviousness of the defect.

D. *Voyage Policies*

A hull policy insures the vessel for a particular voyage ("voyage policy"), or for a period of time ("time policy").¹¹⁵ Differences have arisen as to the existence and extent of the warranty of seaworthiness in either policy. An implied warranty of seaworthiness applies to voyage policies and is implied at the commencement of the risk. The seaworthiness warranty in a voyage policy is absolute in nature and independent of any knowledge or fault on the part of the insured.¹¹⁶ It is also not dependent on whether the subsequent loss is directly attributable to the lack of seaworthiness.¹¹⁷ Liability results if the defective condition existed when the policy was issued.¹¹⁸

Under both U.S. and British insurance law, the warranty applies to "every voyage policy, no matter what the interest, whether it is the ship itself, or the cargo carried in it, or the freight."¹¹⁹ The MIA states that:

- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
- (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.¹²⁰

115. A voyage policy is an insurance policy covering a voyage charter, in which the ship is engaged to carry full cargo on a specific voyage, and the ship is manned, controlled and navigated by the owner. See *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1425 n.5 (5th Cir. 1993).

116. See *id.* at 1431; PARKS, *supra* note 4, at 258.

117. See PARKS, *supra* note 4, at 258.

118. See *Johnson Bros. Boat Works v. Conrad*, 156 A.2d 175, 179 (N.J. Super. Ct. Law Div. 1959).

119. R.J. LAMBETH, *TEMPLEMAN ON MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE* 37 (1981). California's codification of this area provides as follows: "Where any portion of the voyage contemplated by a policy differs from other portions in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if, at the commencement of each portion, the ship is seaworthy with reference to that portion." CAL. INS. CODE § 1924 (Deering 1997).

120. However, the ship need only be seaworthy when she sails on her voyage, and it is "immaterial whether she was seaworthy when she was lying in port." See *IVAMY*, *supra* note 3, at 320. See, e.g., *Parmeter v. Cousins*, 170 Eng. Rep. 1141 (1809).

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.¹²¹

In a voyage policy, under either U.S. or British law, where the warranty is implied, the insured must comply exactly with the policy. If the insured breaches the seaworthiness warranty in any way, the insurer is discharged from liability for injury suffered after the date of the breach of warranty.¹²² "If [the warranty] be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to liability incurred by him before that date."¹²³ The insurer therefore avoids liability for losses incurred after the breach.¹²⁴ With respect to materiality, "the insurer is discharged regardless of whether or not the warranty of seaworthiness was material to the risk, and whether or not the failure to comply with the warranty of seaworthiness caused or contributed to the loss."¹²⁵ The insured therefore is denied coverage if the insurer proves any unseaworthy condition, regardless of whether or not the condition caused the covered loss.¹²⁶

121. Marine Insurance Act, *supra* note 13, § 39.

122. See Brice, *supra* note 93, at 111.

123. Marine Insurance Act, *supra* note 13, § 33(3).

124. Under British law, however, the insured can escape liability if he can show the breach was excused pursuant to section 34(1) of the Marine Insurance Act 1906. See *id.* §34(1).

125. Quebec Marine Ins. Co. v. Commercial Bank of Canada, 17 Eng. Rep. 1 (P.C. 1870). See generally Bank of Nova Scotia v. Hellenic Mut. War Risks Ass'n, Ltd., 2 Lloyd's Rep. 191 (H.L. 1991):

We do not agree that the entry of a vessel into a [prohibited zone], even though a breach of warranty under [Rule] 25C, has the effect automatically and without more of bringing the contract of insurance to an end. It entitles the insurer to treat the contract as at an end if he so chooses, but the matter is one for his choice.

Id. at 201 (quoting Bank of Nova Scotia v. Hellenic Mut. War Risks Ass'n, Ltd., 2 Lloyd's Rep. 238, 254 (C.A. 1989)).

126. See Employers Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1432 (5th Cir. 1993).

If the implied warranty of seaworthiness in a voyage policy is breached—that is, if the vessel is not in fact seaworthy at the beginning of the voyage or at the inception of the risk—then no recovery can be had on the policy. This result does not depend on the . . . subsequent

There is no requirement of affirmative fault on the part of the shipowner in order to deny coverage. The shipowner's negligence, either in terms of an innocent mistake or ignorance of the vessel's condition, prevents collection of the policy if the ship is deemed unseaworthy.¹²⁷ If a member of the crew negligently renders the vessel unseaworthy prior to the commencement of the voyage, the shipowner will not recover under a voyage policy, regardless of privity.¹²⁸

Similar rules apply to a voyage made in multiple stages. Each stage must be viewed independently in evaluating the seaworthiness of that particular stage of the voyage.¹²⁹ In *Bouillon v. Lupton*,¹³⁰ for example, the court held that the warranty had been complied with if different degrees of seaworthiness were necessary for the different stages of the voyage, and if at the commencement of each stage the vessels were properly equipped for the particular stage.¹³¹ In cases of divisible voyages, the burden falls on the insured to prove the necessity of dividing the voyage into stages once the insurer demonstrates that the vessel was not seaworthy for the voyage from its outset.¹³²

loss being directly attributable to the lack of seaworthiness.

Id.; see also *Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co.*, 136 U.S. 408, 429 (1890); *Gregoire v. Underwriters at Lloyds*, 559 F. Supp. 596, 598 (D. Alaska 1982); GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* § 2-6 (2d ed. 1975).

127. See LAMBETH, *supra* note 119, at 37.

128. See *id.*

129. See *Eridania S.p.A. v. Oetker*, 1 Lloyd's Rep. 307 (Q.B. Comm. Ct. 1999) ("[S]eaworthiness is not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular of stage of the voyage on which the ship is engaged."); *Liberian Ins. Agency v. Mosse*, 2 Lloyd's Rep. 560 (Q.B. 1977) ("The vessel sailed on a stage of the voyage with insufficient bunkers and to this extent was in breach of a warranty of seaworthiness."); *A.E. Reed & Co. v. Page, Son & East Ltd.*, 1 K.B. 743 (1927); see also *Marine Insurance Act 1906*, *supra* note 13, § 39(3).

130. *Bouillon v. Lupton*, 143 Eng. Rep. 726 (1863).

131. See *id.* at 731.

132. See *Quebec Marine Ins. Co. v. Commercial Bank of Canada*, 17 Eng. Rep. 1 (P.C. 1870); *The Vortigern*, 68 L.J.P. 49 (P. 1899) (holding that a vessel which was not adequately provided with coal for each stage of the voyage was unseaworthy); *Northumbrian Shipping Co. Ltd. v. E. Timm & Son Ltd.*, 2 All E.R. 648, 657 (H.L. 1939) ("[T]he voyage may be divided into stages, and . . . it is sufficient if she be satisfactorily equipped for each stage at its commencement."); see also IVAMY, *supra* note 3, at 322-23.

E. *Time Policies*

The American law regarding warranties of seaworthiness in voyage policies is closely aligned to British law. However, the same is not true for time policies. Like the harsh standards of both countries on voyage policies, the United States maintains such standards for time policies whereas British law does not.

1. *British Law*

Time policies cover a charter-party,¹³³ where the risk is limited to a certain fixed term or period of time, rather than a given voyage.¹³⁴ Under British law, there is no implied warranty of seaworthiness in an ordinary time policy because the vessel is usually already at sea. Thus, the owner is unable to guarantee or control the vessel's condition.¹³⁵ As one commentator noted over ninety years ago, "there is nothing to prevent a time policy lapsing and a new one beginning when the vessel is at sea, beyond the knowledge and control of her owner or manager as respects unseaworthiness: that consequently insistence on the warranty in such a case might become inequitable."¹³⁶ There is therefore, no implied warranty of seaworthiness in British time hull policies.¹³⁷ However, an exception, grounded in equitable considerations, to the rule against implied warranties of seaworthiness in British time policies arises where the ship is sent to sea in an unseaworthy state with the privity of the insured.¹³⁸ The insurer avoids liability,

133. A charter is a contract for the temporary rent or lease of a vessel. BLACK'S LAW DICTIONARY 236 (6th ed. 1990).

134. A time-policy is "[a] policy of marine insurance in which the risk is limited, not to a given voyage, but to a certain fixed term or period of time." *Id.* at 1483.

135. See Marine Insurance Act 1906, *supra* note 13, § 39(5); LAMBETH, *supra* note 119, at 41. For a survey of English case law refusing to find an implied warranty of seaworthiness in a time policy, see PARKS, *supra* note 4, at 264, 265.

136. WILLIAM GOW, MARINE INSURANCE 272 (4th ed. 1909).

137. See *Rosa v. Insurance Co. of Pa.*, 296 F. Supp. 167 (S.D. Cal. 1969) *aff'd*, 421 F.2d 390 (9th Cir. 1970). The MIA states: "in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where with the privity of the insured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable." Marine Insurance of Act 1906, *supra* note 13, § 39(5).

138. See PARKS, *supra* note 4, at 257; *J.J. Lloyd Instruments Ltd. v. Northern Star Ins. Co. Ltd.*, 1 Lloyd's Rep. 32 (C.A. 1986).

[T]he Act provides that in a time policy (as distinct from a voyage pol-

thereby sustaining a valid defense under MIA section 39(5), if he shows that: (1) the ship was sent to sea¹³⁹ in an unseaworthy state (2) with the privity of the insured,¹⁴⁰ and (3) that the whole loss or a certain part thereof was attributable to such unseaworthiness.¹⁴¹

Privity arises in cases where the shipowner has positive knowledge of, or when he turns a "blind eye" to, the unseaworthiness.¹⁴² Lord Denning, who drew a clear distinction between negligence and "knowing neglect," gave privity the following interpretation:

To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that these facts rendered the ship unseaworthy, that is not reasonably fit to encounter the ordinary perils of the sea. . . . If a man suspicious of the truth, turns a blind eye to it, and refrains from inquiry—so that he should not know it for certain—then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.¹⁴³

Privity alone will not, however, excuse the insurer. In addition, the unseaworthiness to which the owner is privy

icy): ". . . there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

Id.; *Compania Maritima San Basilio S.A. v. The Oceanus Mut. Underwriting Ass'n (Berm.) Ltd.*, 3 All E.R. 243 (Q.B. 1977).

139. In a U.S. case defining the meaning of the MIA's "sent to sea" language, the court did not relieve insurers from liability for a loss that occurred when railroad cars and insured goods rolled off a car float and into a river, where the car float had not been "sent to sea" but was still moored at the time of the accident. *See New York, New Haven & Hartford R.R. Co. v. Gray*, 240 F.2d 460 (2d Cir. 1957).

140. *See supra* note 20; *see also Compania Maritima San Basilio S.A.*, 3 All E.R. at 243; *G. Choen, Sons & Co. v. Standard Marine Ins.*, 20 Lloyd's List L. Rep. 133 (1925); *M. Thomas & Son Shipping Co. v. London & Provincial Marine*, 29 L.T.R. 736 (1913). *But see Willmott v. General Accident Fire & Life Assurance Corp., Ltd.*, 55 Lloyd's List L. Rep. 156 (K.B. 1935); *Frangos v. Sun Ins. Office*, 49 Lloyd's List L. Rep. 354 (1934); *Thomas v. Tyne & Wear S.S. Freight Ins. Ass'n*, 1 K.B. 938 (1917).

141. *See Griggs, supra* note 14, at 440.

142. *See LAMBETH, supra* note 119, at 42, 437.

143. *Compania Maritima San Basilio S.A.*, 3 All E.R. at 243.

must be the proximate cause of the loss.¹⁴⁴ Therefore, even if the ship sunk with gaping holes in the hull, of which the shipowner was aware, this will not relieve the insurer unless those holes caused the vessel to sink. Consequently, where there are two "unseaworthy characteristics," and the insured is only privy to one, the insurer is only protected if the loss is attributable to that particular unseaworthy characteristic privy to the insured.¹⁴⁵ If the insured shows, through direct evidence, that the vessel was fortuitously lost due to a peril of the seas, the insured ordinarily recovers.¹⁴⁶

Under English law, then, unseaworthiness is mostly irrelevant to claims made under time policies. Unseaworthiness in a British time policy may still be relevant when a ship vanishes without a trace and the ship is shown unseaworthy when she left port, with the owner's knowledge of the unseaworthy condition, and that condition caused the damage.¹⁴⁷

2. *United States Law*

In the first half of the nineteenth century, American courts expanded upon the British rule by asserting that the insured must use proper care to maintain the seaworthiness of the vessel throughout the insurance period and not just at the commencement of the risk.¹⁴⁸ Indeed, U.S. courts did not make, and continue to ignore, any real distinction between time and voyage policies in terms of the implied warranty of seaworthiness.¹⁴⁹ British precedents were summarily rejected in favor of the newly crafted American Rule.¹⁵⁰ Although rejected by some states, such as Illinois,¹⁵¹ the American Rule

144. See *Rosa v. Insurance Co. of Pa.*, 296 F. Supp. 167 (S.D. Cal. 1969) (holding that the owner's knowledge of the existing defects that caused the vessel to be unseaworthy at outset of voyage did not preclude coverage where there was no evidence that such defects were the proximate cause of the loss); LAMBETH, *supra* note 119, at 42.

145. See *Griggs*, *supra* note 14, at 437.

146. See *Brice*, *supra* note 93, at 113.

147. See *id.* at 112.

148. See *Dupeyre v. Western Marine & Fire Ins. Co.*, 2 Rob. 457 (La. 1842); *Barnewall v. Church*, 1 Cai. R. 217 (N.Y. 1803).

149. See *Rouse v. Insurance Co.*, 20 F. Cas. 1269, 1270 (C.C.E.D. Pa. 1862) (No. 12,089) (finding there is "an implied warranty of seaworthiness in time policies as well as in policies for voyage."); *Jones v. Insurance Co.*, 13 F. Cas. 982 (C.C.E.D. Pa. 1852) (No. 7,470).

150. See *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 37 (1864), *overruled as stated in* *Kilduff v. Adams, Inc.*, 593 A.2d 478 (Conn. 1991).

151. See *Merchants Ins. Co. v. Morrison*, 62 Ill. 242 (1871).

was accepted by the U.S. Supreme Court in 1888 with *Union Insurance Co. v. Smith*.¹⁵² The Court used the following language:

In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect.¹⁵³

Union Insurance Co. therefore marked the beginnings of the growing chasm between English law, which did not recognize an implied warranty in all time policies, and American insurance law, which did.

Twentieth century jurisprudence saw an attempt to limit the inequitable result of insurers escaping liability for a loss caused by the insured's negligence.¹⁵⁴ The case law seems driven more by courts' desire to achieve international uniformity rather than by their desire to formulate a uniquely American formula, an ideal that could be described as a commercially reasonable principle.¹⁵⁵ Two 1927 cases from the Second Circuit confused the issue however. The first case, *New York, New Haven & Hartford Railroad Co. v. Gray*,¹⁵⁶ ignored both elements of the *Union Insurance Co.* rule.¹⁵⁷ However, this same Second Circuit court held later that year that

152. *Union Ins. Co. v. Smith*, 124 U.S. 405 (1888).

153. *Id.* at 427.

154. *See New York & P.R.S.S. Co. v. Aetna Ins. Co.*, 204 F. 255 (2d Cir. 1913).

155. *See Standard Oil Co. of N.J. v. United States*, 340 U.S. 54 (1950); *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430 (1938); *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924); *Allen N. Spooner & Son Inc. v. Connecticut Fire Ins. Co.*, 314 F.2d 753 (2d Cir. 1963); *Gregoire v. Underwriters at Lloyd's*, 599 F. Supp. 596 (D. Alaska 1982).

156. *New York, New Haven & Hartford R.R. Co. v. Gray*, 240 F.2d 460 (2d Cir. 1957).

157. *See id.* at 466.

a covenant of seaworthiness is implied in every hull insurance policy.¹⁵⁸ The American Rule was gradually narrowed to a rule in which the implied warranty was limited to cases where the vessel was in port at the time of attachment, making it more closely aligned with the British rule, but distinctive nonetheless.¹⁵⁹

The shipowner's obligation under an American time hull policy at the inception of the risk is simple: the vessel must be seaworthy at the attachment of the insurance or at the inception of the risk.¹⁶⁰ As stated by the court in *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*,¹⁶¹ there is an implied condition, at the commencement of the risk, that the vessel is capable of navigation; safe at sea and in port; and seaworthy when she first sails, or has sailed seaworthy and is safe if in port. Thereafter, the seaworthiness obligation is a negative warranty under which the owner or those in privity with him must not (1) fail to exercise due diligence, or (2) send the vessel to sea in a deficient condition.¹⁶² There are therefore two warranties under the American rule. First, an inception warranty that the vessel is seaworthy at the time of the policy's inception. Second, a correlative "negative" warranty, which requires that the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground¹⁶³ in an unseaworthy condition.¹⁶⁴ Thus, an insured has a continuing duty during the term of the policy to exercise due diligence to

158. See *McAllister Lighterage Line, Inc. v. Insurance Co. of N. Am.*, 244 F.2d (2d Cir. 1957).

159. See *Henjes v. Aetna Ins. Co.*, 132 F. 2d 715 (2d Cir. 1943); *Zillah Transp. Co. v. Aetna Ins. Co.*, 221 N.W. 529 (Minn. 1928); see also *Gibson v. Small* 10 Eng. Rep. 353 (H.L. 1853) (stating the British version of this rule).

160. See *Brice*, *supra* note 93, at 110; see also *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 983 (5th Cir. 1969); *Lemar Towing Inc. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652, 660 (E.D. La. 1972).

161. *Gulfstream Cargo*, 409 F.2d at 974.

162. See *Austin v. Servac Shipping Line*, 610 F. Supp. 229 (E.D. Tex. 1985).

163. See *Continental Ins. Co. v. Lone Eagle Shipping*, 952 F. Supp. 1046 (S.D.N.Y. 1997). The *Continental Insurance* court held the vessel owners did not breach the negative implied warranty of seaworthiness, even though they had learned of a breach in integrity of the hull, because the vessel was not in port but was merely in the roads when it was allowed to continue on its voyage on the open sea. The vessel did not break ground when it left the roads, as opposed to situations in which an unseaworthy vessel leaves port. See *id.*

164. See *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940 (11th Cir. 1986); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969). See also *PARKS*, *supra* note 4, at 266.

maintain the vessel in a seaworthy condition, but is not under a duty to maintain absolute seaworthiness under all conditions.

A defense to breach of the seaworthiness warranty under the American Rule exists when the owner did not act with "bad faith" or "knowing neglect."¹⁶⁵ To find a breach of the negative implied warranty of seaworthiness, the court must find that the insured, the owner of the vessel,¹⁶⁶ had "knowledge" of the unseaworthy condition of the vessel.¹⁶⁷ Some courts equate the due diligence requirement with negligence.¹⁶⁸ One court, however, held that due diligence requires only subjectively sufficient actions, even if the conduct is objectively negligent, as long as the conduct is not reckless.¹⁶⁹ The standard of due diligence emerged as another key difference between U.S. and British law on the warranty. What amounts to "due diligence" may be different under English or United States law. In the United States, to defeat the insured's claim that it was diligent, the insurer may also have to show that the insured was negligent in not discovering the unseaworthy condition.¹⁷⁰ Under English law, and the equitable exception described above, a showing of actual knowl-

165. See generally Derek P. Langhauser, *Implied Warranties of Seaworthiness: Applying the Knowing Neglect Standard in Time Hull Insurance Policies*, 39 ME. L. REV. 443 (1987).

166. The knowledge of the master will not be imputed to the owner. See *Texaco v. Universal Marine*, 400 F. Supp. 311 (E.D. La. 1975); see also *Lemar Towing Co., Inc. v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652 (E.D. La. 1972).

167. See *Insurance Co. of N. Am. v. Board of Commr's*, 733 F.2d 1161 (5th Cir. 1984). In *Board of Commr's*, the court held that the vessel owner did not exercise due diligence to maintain its vessel in a seaworthy condition as required by hull policy, and therefore there was no coverage for collision. This was held despite contention that the owner was unaware that its licensed captain, assigned to the tug on the date of casualty, had gone ashore after completing his 12-hour watch, and for two thirds of the time the vessel was commanded by an unlicensed captain. See *id.*; see also *Continental Ins. Co. v. Lone Eagle Shipping Ltd.*, 952 F. Supp. 1046 (S.D.N.Y. 1997); *Lemar Towing*, 352 F. Supp. at 652.

168. See *L & L Marine Serv., Inc. v. Insurance Co. of N. Am.*, 796 F.2d 1032 (8th Cir. 1986); *Jefferson Marine Towing, Inc. v. Underwriters at Lloyd's, London*, 472 So. 2d 146 (La. App. 1985).

169. See *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 864 F. Supp. 239 (D. Mass. 1994) (holding that due diligence required of an insured under the seaworthiness warranty was satisfied by conduct subjectively believed by insured to be adequate, even though insured negligently sailed while boat was in an unseaworthy condition).

170. See *L & L Marine Service*, 796 F.2d at 1032; *Gregoire v. Underwriters at Lloyd's, London*, 559 F. Supp. 596 (D. Alaska 1982).

edge of the unseaworthiness may be required. Some courts, however, remain uncertain as to whether the negligence/actual knowledge distinction is a valid one.¹⁷¹

In order to absolve the insurer, the breach of the negative warranty must be the proximate cause of the loss under the American Rule.¹⁷² To determine proximate cause in maritime insurance cases courts look to the predominant, determining, or real efficient cause of the loss. Proximate cause is not determined by "but for" causation, therefore making it a stricter analysis than in some negligence cases.¹⁷³

If the warranty of seaworthiness at the inception of the voyage is breached, the breach voids the policy if the shipowner had prior knowledge of the unseaworthy condition.¹⁷⁴ By contrast, knowingly permitting the vessel to break ground in an unseaworthy condition denies liability only for loss or damage proximately caused by the unseaworthiness.¹⁷⁵ Such a breach does not, therefore, void the entire policy, but only serves to exonerate the underwriter for loss or damage proximately caused by the unseaworthy condition.¹⁷⁶ The vessel need not continue to be absolutely seaworthy, but the insurer will not be liable for any loss attributable to unseaworthiness to which the insured was privy.¹⁷⁷

The American Rule is "not so well established as its name implies" and "the great majority of the decided cases in this country are consistent with the English Rule."¹⁷⁸ It should

171. See *Tropical Marine Prods., Inc. v. Birmingham Fire Ins. Co.*, 247 F.2d 116 (5th Cir. 1957) (holding that knowledge of patent defect is not required).

172. Under California law, unseaworthiness does not give the insurer a complete defense, regardless of proximate cause. See *Rosa v. Insurance Co. of Pa.*, 296 F. Supp. 167 (S.D. Cal. 1969); see also CAL. INS. CODE § 1920 (Deering 1997).

173. *Continental Ins. Co. v. Lone Eagle Shipping*, 952 F. Supp. 1046 (S.D.N.Y. 1997), *aff'd*, 134 F.3d 103 (2d Cir. 1998). Like seaworthiness, determination of proximate cause in marine insurance cases has been deemed "solidly entrenched." See *Beer*, *supra* note 30, at 161.

174. See *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1431-32 (5th Cir. 1993).

175. See *Lloyd's U.S. Corp. v. Smallwood*, 719 F. Supp. 1540 (M.D. Fla. 1989); *Jefferson Marine Towing, Inc. v. Underwriter's at Lloyd's London*, 472 So. 2d 146 (La. Ct. App. 1985).

176. See *Insurance Co. of N. Am. v. Board of Comm'rs*, 733 F.2d 1161, 1166 (5th Cir. 1984); *Lemar Towing Co v. Fireman's Fund Ins. Co.*, 352 F. Supp. 652, 660 (E.D. La. 1972).

177. See *Saskatchewan Gov't Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385 (5th Cir. 1957).

178. Russel W. Pritchett, *The Implied Warranty of Seaworthiness in Time*

therefore be hesitantly applied. Courts, however, cite the following rationale behind applying the warranty in time policies, "the sound reasons supporting an absolute, implied warranty of seaworthiness at the inception of a voyage policy also support such a warranty in the context of a time policy—at least where the ship is in a port of repair at the time the policy attaches."¹⁷⁹ Courts cite the superior knowledge of the insured and requirement of knowledge of unseaworthiness as reasons to apply a continuing warranty of seaworthiness, rather than a warranty at the inception of the risk, as under English law. Applying the American Rule also strongly favors underwriters.¹⁸⁰ Given the longstanding and ongoing confusion surrounding the mechanics of the warranty in time policies, courts should harmonize the "American Rule" with the English law, which implies no such warranty under these circumstances.

F. *Relation to Limitation of Liability*

There is an important connection between seaworthiness and limitation of liability. The Shipowner's Limitation of Liability Act ("LLA") allows a shipowner to limit liability for any collision or other damage caused by his vessel to his interest in the vessel.¹⁸¹ The LLA prohibits the limitation of liability if the vessel was unseaworthy at the time of injury and unseaworthiness was a cause of the injury.¹⁸²

Under the LLA, claimants, or opponents to limitation, have the initial burden of proving the negligence or unseaworthiness of the vessel. After establishing unseaworthiness, the burden shifts to the vessel's owner, who is seeking limitation, to prove that the unseaworthiness did not contribute to the collision and was not within his privity or knowledge.¹⁸³

Policies: the American View, 1983 LLOYD'S MAR. & COM. L. 195 (1983).

179. *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F.2d 1422, 1436 (5th Cir. 1993).

180. See DONALD O'MAY, MARINE INSURANCE LAW & POLICY 89 (1993).

181. See 46 U.S.C.A. app. § 183 (West 1958 & Supp. 1999).

182. See *id.* §§ 190, 191.

183. See *Brister v. A.W.I. Inc.*, 946 F.2d 350 (5th Cir. 1991); *In re Sause Bros. Ocean Towing*, 769 F. Supp. 1147 (D. Or. 1991); *In re Texaco, Inc.*, 570 F. Supp. 1272 (E.D. La. 1983); see also *Illinois Constructors Corp. v. Logan Transp.*, 715 F. Supp. 872 (N.D. Ill. 1989) (limiting liability to the value of the vessel where shipowner provided a seaworthy vessel and a competent crew and where the navigational errors of pilot, which were sole proximate cause of collision, were not within privity or knowledge of owner).

The court must determine which act of negligence or conditions of unseaworthiness caused the damage, then evaluate whether the shipowner had knowledge or privity of those specific acts or conditions.¹⁸⁴ Therefore, finding knowledge of an unseaworthy condition prohibits limitation, thereby exposing the shipowner to extensive liability in the absence of liability insurance coverage.

IV. CLAIMS FOR PERSONAL INJURY

Obviously, unseaworthiness not only causes damage to vessels and their cargo, but can also cause injuries to persons. In cases of personal injury, seaworthiness becomes a cause of action, rather than a primarily insurance-related consideration. Unique and contrasting principles apply for injuries to seamen, crew members, and third parties, especially when discussing differences between British and U.S. law. British law, for example, makes no distinction between maritime and non-maritime claims for personal injury or death. Perhaps even more startling to the American lawyer is that liability for a seaman's personal injury under British law is fault based—absolute liability does not exist.¹⁸⁵ Although a maritime employer owes a duty to his employees to exercise reasonable care in maintaining a seaworthy vessel, seaworthiness is not an absolute obligation in the British system. Furthermore, damages are assessed by a judge rather than by a jury.¹⁸⁶

Overall, United States law is far more generous to its

184. See *In re Ta Chi Navigation Corp., S.A.*, 513 F. Supp. 148, 160 (E.D. La. 1981). The owner cannot, however, claim that his lack of knowledge was caused by a delegation of his duties, given the non-delegable nature of the duty to provide a seaworthy vessel. See *In re Ocean Foods Boat Co.*, 692 F. Supp. 1253 (D. Or. 1988). In *Ocean Foods Boat Co.*, the owner of a ship involved in a collision that was partly the result of the negligence of crew members, could not limit its liability on the ground that it had delegated hiring of the crew to a competent master because there was opportunity for day-to-day consultation between the master and owner. The owner established no procedures for hiring replacement crew members, and master was never told that he was to hire competent crew. See *id.*; see also *In re Hellenic Lines, Ltd.*, 813 F.2d 634 (4th Cir. 1987) (holding that second mate's failure to call captain, along with his failure to comply with proper steering procedures, constituted a mistake of navigation to which owner of vessel was not deemed in privity for purpose of allowing shipowner to limit its liability to value of vessel and her freight).

185. See Lord Donaldson of Lymington, *Sources of Recovery for Maritime Personal Injury and Death under British Law*, 68 TUL. L. REV. 367 (1994).

186. See *id.* at 371.

seamen in terms of remedies for unseaworthiness causing personal injury. In addition to statutory enactments, U.S. common law fashioned a "general maritime law" cause of action for a seaman's injuries caused by unseaworthiness.

A. General Maritime Law Remedy for Unseaworthiness

The maritime common law cause of action for unseaworthiness has long appealed to injured seamen.

The admiralty doctrine of absolute liability for unseaworthiness is based on protection of seamen who sign articles for a voyage and are then under the absolute control of a master with power to order seamen to do the ship's work in any weather, under any conditions, using such equipment as may be furnished by the shipowner.¹⁸⁷

Under the general maritime principles of seaworthiness, an owner, *pro hac vice* or otherwise, owes to seamen an *absolute* duty to "furnish a ship, crew, and appurtenances reasonably fit for their intended service, i.e., a duty to provide a seaworthy vessel."¹⁸⁸ This absolute duty does not extend to passengers, invitees, or guests, who are relegated to a negligence cause of action.¹⁸⁹ An owner's failure to provide a seaworthy vessel results in strict liability, without regard to negligence or notice, in which the vessel may be liable *in rem*, and the owner personally liable, for personal injuries to sea-

187. *Offshore Co. v. Robinson*, 266 F.2d 769, 781 (5th Cir. 1959); *see also* *Powell v. F.J. O'Hara & Sons, Inc.*, 411 F. Supp. 377 (D. Me. 1976).

188. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960); *see also* *Lieberman v. Matson Navigation Co.*, 300 F.2d 661 (9th Cir. 1962); *Tanzi v. Deutsche Dampfschiffahrts-Gesellschaft Hansa v. International Terminal Operating Co., Inc.*, 355 F. Supp. 432 (S.D.N.Y. 1973); *Alvez v. American Export Isbrandtsen Lines*, 434 N.Y.S.2d 384 (App. Div. 1980).

189. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (holding that shipowner's disclaimer of the warranty of seaworthiness could not reasonably be interpreted as waiving its duty to provide adequate accommodations to its passengers inasmuch as the doctrine of seaworthiness does not apply to passengers); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975) (holding that shipowner owed passengers a duty to exercise reasonable care); *Griffith v. Martech Int'l, Inc.*, 754 F. Supp. 166, 169 (C.D. Cal. 1989) (holding that the duty of a shipowner to furnish a seaworthy vessel extends only to seamen and not to passengers, visitors, or other persons aboard vessel who are instead owed only duty of due care, a negligence standard); *Armour v. Gradler*, 448 F. Supp. 741 (D. Pa. 1978) (holding that since guest was not aboard vessel to perform traditional duties assigned to one in a ship's employ, he was not a "seaman" to whom doctrine of seaworthiness extended, and thus is owed duty of reasonable care).

men.¹⁹⁰

A ship operator only owes a duty under the general maritime law to seamen employed as crew. A crewmember means a seaman having a substantial relation to the ship in terms of duration of shipboard employment. One who "does the work of a seamen," or a seaman *pro hac vice*, is entitled to seaworthiness as a remedy. "The critical question is whether . . . [the plaintiff] was doing the work of a seaman aboard the barge. If he was, he is entitled to sue on the warranty of seaworthiness; if not, his suit must be dismissed."¹⁹¹ Pilots, for example, are not entitled to the seaworthiness remedy, primarily because they lack the requisite attachment to the vessel.¹⁹²

B. *Jones Act*

The Jones Act protects the American seaman from unseaworthy conditions. Enacted in 1920, the Jones Act provides a statutory cause of action for the injury or death of a seaman caused by negligence,¹⁹³ a cause of action not allowed under traditional general maritime law.¹⁹⁴

A cause of action under the Jones Act is distinct from a claim under the common law maritime unseaworthiness doctrine: "the concept of liability to a seaman injured aboard a

190. See CHARLES M. DAVIS, MARITIME LAW DESKBOOK 145 (1997).

191. *Browning v. B.F. Diamond Construction Co., Inc.*, 289 S.E.2d 268, 270 (Ga. Ct. App. 1982) (quoting *Lewis v. Roland E. Trego & Sons*, 501 F.2d 372, 374 (4th Cir. 1974)); see also *Savard v. Marine Contracting, Inc.*, 471 F.2d 536 (2d Cir. 1972); *Turner v. Niagara Frontier Transp. Auth.*, 748 F. Supp. 80 (W.D.N.Y. 1990); *Cwick v. Rochester*, 107 A.D.2d 1074 (N.Y. App. Div. 1985).

192. See *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991) (holding that harbor pilot who was not "more or less permanently attached" to vessel was not a seaman for purposes of Jones Act); *Bach v. Trident Shipping Co., Inc.*, 708 F. Supp. 772 (E.D. La. 1988) (holding that pilot acting as an independent contractor through pilots' association which assigned him to vessel was not a Jones Act seaman because there was no employer-employee relationship between him and vessel's operator); *Clark v. Solomon Navigation Co.*, 631 F. Supp. 1275 (S.D.N.Y. 1986) (holding that independent river pilot was not covered by Jones Act).

193. The Jones act provided:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law.

46 U.S.C.A. app. § 688 (West 1975).

194. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

ship as a result of negligence by the vessel is completely different from liability as a result of unseaworthiness.”¹⁹⁵ “Lack of seaworthiness results in liability without fault while liability in the former case depends on failure of the vessel or owner to exercise reasonable care.”¹⁹⁶ In unseaworthiness causes of action, how the unseaworthy condition developed, whether by negligence or otherwise, is irrelevant to the shipowner’s liability for personal injuries resulting therefrom.¹⁹⁷ “Since the inquiry in unseaworthiness cases is not directed to the issue of the owner’s fault, it follows that prior notice, actual or constructive, of the unseaworthy condition is not essential to a cause of action based on that doctrine.”¹⁹⁸ A seaman may join a claim for unseaworthiness under general maritime law with a claim under the Jones Act for negligence, where the actions resulting in unseaworthiness were the result of negligence rather than mere accident.¹⁹⁹ With regard to wrongful death, the Jones Act provision creating a negligence cause of action against a seaman’s employer is preclusive only of state remedies for death from unseaworthiness and does not preempt general maritime wrongful death actions.²⁰⁰

The dual nature of the remedial scheme was first addressed in *Mitchell v. Trawler Racer, Inc.*²⁰¹ In *Mitchell*, the Court held that “the decisions of this Court have undeviatingly reflected an understanding that the owner’s duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.”²⁰² The Court also noted that case law evolved into “a complete divorcement of unseaworthiness liability from concepts of negligence.”²⁰³ The standard for proximate cause is higher in unseaworthiness cases. In an unseaworthiness case, “a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury

195. *Slaughter v. S.S. Ronde*, 390 F. Supp. 637, 640 (S.D. Ga. 1974).

196. *Id.* at 640–41.

197. *See id.* at 641.

198. *Poignant v. United States*, 225 F.2d 595, 597 (2d Cir. 1955).

199. *See Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 528–29 (5th Cir. 1979).

200. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990).

201. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

202. *Id.* at 549.

203. *Id.* at 550.

and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness.²⁰⁴ With respect to available remedies against the vessel *in rem* or the operator *in personam*, the seaman may recover loss of income, medical expenses, pain and suffering, and compensation for disability, under both the Jones Act and a general maritime unseaworthiness cause of action.²⁰⁵

C. Longshore and Harbor Workers' Compensation Act

In 1946, the Supreme Court decision of *Seas Shipping Co. v. Sieracki*²⁰⁶ extended to maritime workers the right to recover from the vessel owner under a theory of unseaworthiness.²⁰⁷ This recovery was previously available only to seamen. In *Sieracki*, the Court held that a longshoreman, for all practical purposes, is a seaman "because he is doing a seaman's work and incurring a seaman's hazards, [and, a]s such, he [is] entitled to a seaman's warranty of seaworthiness."²⁰⁸ To recover under the unseaworthiness doctrine of *Sieracki*, a longshoreman need only prove an unsafe, injury-causing condition on board the vessel.²⁰⁹

The 1972 amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA") eliminated this strict liability remedy.²¹⁰ Pursuant to 33 U.S.C. § 905(b), tort li-

204. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988).

205. See generally Arthur J. Mandell and Herman Wright, *Seamen's Injuries*, in 9 AM. JUR. TRIALS 665 (1965). See also *Bush v. Diamond Offshore Co.*, 46 F. Supp. 2d 515 (E.D. La. 1999); *Alexie v. Columbia Coastal Transp., Inc.*, No. CIV.A.97-0052, 1997 WL 313414, at *1 (E.D. La. June 9, 1997); *Trident Marine, Inc. v. M/V Atticos*, 876 F. Supp. 832 (E.D. La. 1994); *Viator v. Liverpool & London S.S. Protection & Indem. Ass'n*, 701 So. 2d 487 (La. Ct. App. 1997).

206. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

207. See *id.* at 95.

208. Rodney A. Seydel, Jr., *Status of the Sieracki-Seaman after the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 57 TUL. L. REV. 379, 382 (1982).

209. See *id.*

210. The Longshore and Harbor Worker's Compensation Act states:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons en-

ability of a vessel to a person covered by the LHWCA "cannot be based upon the warranty of seaworthiness or a breach thereof."²¹¹ This statutory withdrawal of the warranty of seaworthiness from longshore and harbor workers was deemed constitutional by at least one federal court.²¹² Despite the LHWCA amendments, longshore workers may qualify as seamen *pro hac vice*, depending on their duties, and could therefore pursue the remedy available under general maritime law.

D. *Wrongful Death: Death on the High Seas Act (DOHSA) and Other Remedies*

The warranty of seaworthiness does not extend to passengers on vessels. Passengers are entitled to voyage on a vessel properly equipped to handle reasonable conditions and accomplish the purpose of the voyage.²¹³ While not entitled to strict liability protections, some third parties (including vessel passengers) may be entitled to a higher duty of care based on traditional tort principles.

Section 761 of the Death on High Seas Act ("DOHSA")²¹⁴ provides for a cause of action for death resulting from unsea-

gaged in providing ship building or repair services to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C.A. § 905(b) (West 1976) (emphasis added).

211. *Slaughter v. S.S. Ronde Fyffes Group*, 509 F.2d 973, 974 n.1 (5th Cir. 1975).

212. See *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., KG.*, 387 F. Supp. 440 (E.D. Pa. 1974).

213. See *In re Catalina Cruises, Inc.*, 930 F. Supp. 1384, 1393 (C.D. Cal. 1996).

214. The Death on High Seas Act states:

Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C.A. app. § 761 (West 1975).

worthiness of a vessel. DOHSA provides a remedy in admiralty for the death of any person caused by wrongful act, neglect, or default, including the breach of warranty of seaworthiness.²¹⁵ However, the standard of care owed is different depending on the status of the decedent. While the warranty of seaworthiness under DOHSA imposes on the shipowner the absolute duty to provide a seaman with a seaworthy vessel and equipment reasonably fit for its intended use on the vessel, it only requires that non-seamen third persons not be negligently put at risk.²¹⁶ The survivor of a seaman may thus bring a claim for wrongful death under DOHSA for a death caused by unseaworthiness predicated on strict liability.²¹⁷ However, as applied to passengers on a vessel, or other non-seaman third parties, the duty is based on negligence rather than strict liability.²¹⁸

In addition to these federal statutory causes of action, state law remedies for wrongful deaths within territorial waters may also be available.²¹⁹ In *Yamaha Motor Corporation U.S.A. v. Calhoun*,²²⁰ the Supreme Court decided that non-seafarers, meaning those not covered by the Jones Act or LHWCA, are entitled to state law remedies for wrongful death occurring within territorial waters. *Yamaha Motor* reversed an earlier trend of displacing state tort law remedies in favor of the "federal maritime cause of action."²²¹ An indi-

215. See *In re Industrial Transp. Corp.*, 344 F. Supp. 1311, 1319 (E.D.N.Y. 1972).

216. See *Soileau v. Niclos Drilling Co.*, 302 F. Supp. 119, 126 (W.D. La. 1969); *Doyle v. Albatross Tanker Corp.*, 260 F. Supp. 303, 306 (S.D.N.Y. 1965).

217. See *Chermesio v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36, 39 (D. Mass. 1962) (holding that DOHSA gives a remedy for breach of warranty of seaworthiness, and that a libelant may recover thereunder without proof of negligence or culpability); see also *Trident Marine, Inc. v. M/V Atticos*, 876 F. Supp. 832, 833 (E.D. La. 1994) (stating that the four basic theories upon which a seaman may base a claim for recovery when suffering a personal injury or wrongful death are (1) a Jones Act negligence cause of action, (2) a DOHSA claim, (3) a general maritime law action for unseaworthiness of the ship, and (4) a general maritime law action for negligence).

218. See *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 277 (5th Cir. 1974) ("Maritime duty of a shipowner to . . . a nonseaman 'on board for purposes not inimical to the legitimate interests [of the shipowner],' is not one of furnishing a seaworthy hull and appliances without regard to fault, but one of 'exercising reasonable care under the circumstances.'" (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959))).

219. See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

220. *Id.*

221. *Id.* at 206.

vidual may therefore have recourse to state law remedies for deaths occurring within "all inland waters, all water between [the] line of mean high tide and [the] line of ordinary low water, and all waters seaward to a line three geographical miles distant from the coast line."²²² This obviously encompasses deaths caused by unseaworthiness.

The United States should align itself with the British model only insofar as lessening distinctions between seamen, other maritime workers, and third parties in cases of injuries or death caused by unseaworthiness. While the absolute standard owed to seamen should not be extended to all, "non-maritime" third parties should be owed a higher standard of care than is currently required of vessel operators given the discrepancy in knowledge and experience.

V. CONCLUSIONS

The importance of the seaworthiness doctrine cannot be understated. An understanding of its principles is fundamental, whether engaged in the practice of maritime personal injury or commercial shipping. The doctrine's evolution has, however, been painstaking in many ways. Despite the apparent good intentions of the courts, disharmony and inconsistency result in a simple concept being at times maze-like in its intricacy. With respect to carriage of goods and marine insurance, the courts should look to the Marine Insurance Act for guidance in application of the warranty, and thereby harmonize U.S. law with British principles. The first step in this endeavor would be a judicial abolition of the much-maligned "American Rule." Addition of an American Marine Insurance Act codifying a harmonized law would remove the clouds of ambiguity from this and other marine insurance principles.

Similarly, U.S. law should emulate the British law on personal injury arising from unseaworthiness. Rather than perpetuating a strict liability standard for seamen, a "higher duty" negligence remedy should be extended to all seamen, harbor workers, and third parties injured by unseaworthiness. In addition to ending the bountiful litigation surrounding the definition of seamen, at least in unseaworthiness cases, this all-encompassing standard would protect all

222. BLACK'S LAW DICTIONARY 1473 (6th ed. 1990) (defining "territorial waters").

persons exposed to unseaworthiness who may not be protected by statutory enactments. Overall, much work is needed before the seaworthiness doctrine becomes a homogeneous principle, which practitioners can easily and consistently apply.